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Held, that grantor intended to reserve to herself the full power to dispose of the land at any time, and hence the deed vested a fee simple in her.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 345-355, 416-428, 434, 435, 439, 452; Dec. Dig. § 124.* 4 Va.-W. Va. Enc. Dig. 439; 14 Va.-W. Va. Enc. Dig. 324; 15 Va.-W. Va. Enc. Dig. 273.]

4. Deeds (§ 97*)—Construction—Habendum Clause.—The rule, that the habendum clause of a deed yields to the granting clause when repugnant, does not apply where the intention of the parties can be ascertained with reasonable certainty from the whole instrument.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 267-273, 434-447; Dec. Dig. § 97.* 4 Va.-W. Va. Enc. Dig. 423.]

5. Deeds (§ 28*)—Construction—Habendum Clause.—The purpose of a habendum clause is to define the estate taken by the grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 53; Dec. Dig. § 28.* 4 Va.-W. Va. Enc. Dig. 419; 14 Va.-W. Va. Enc. Dig. 320; 15 Va.-W. Va. Enc. Dig. 268.]

6. Deeds (§ 97*)—Construction—Habendum Clause.—If the whole deed shows that it was intended by the habendum clause to restrict or enlarge the estate conveyed by the granting clause, the habendum clause will control.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 267-273, 434-447; Dec. Dig. § 97.* 4 Va.-W. Va. Enc. Dig. 423.]

Appeal from Circuit Court, Culpeper County.

Suit by the Culpeper National Bank and others against Sarah E. Wrenn and others. From a decree in part for complainants, they appeal. Reversed.

Hidden & Thurlow, Gibson & Nottingham, and Waite & Perry, all of Culpeper, for appellants.

Grimsley & Miller, of Culpeper, for appellees.

LOONEY v. COMMONWEALTH.

June 16, 1913.

[78 S. E. 625.]

1. Criminal Law (§§ 121, 1150*)—Change of Venue—Discretion of Trial Court.—A motion under Code 1904, § 4036, for a change of venue on the ground of prejudice against accused is addressed to the discretion of the trial court, and its ruling will not be disturbed unless it plainly appears that the discretion has been improperly exercised.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 241, 3044; Dec. Dig. §§ 121, 1150.* 2 Va.-W. Va. Enc. Dig. 787; 14 Va.-W. Va. Enc. Dig. 208; 15 Va.-W. Va. Enc. Dig. 173.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

2. Criminal Law (§ 1148*)—Jury (§ 7*)—Summoning Jury—Motion to Summon Jury from Another County—Discretion of Court.—A motion under Code 1904, § 4024, for a jury from another county is addressed to the discretion of the trial court, and its ruling will not be disturbed unless it plainly appears that the discretion has been improperly exercised.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3050-3052; Dec. Dig. § 1148;* Jury, Cent. Dig. § 12; Dec. Dig. § 7.* 9 Va.-W. Va. Enc. Dig. 8; 14 Va.-W. Va. Enc. Dig. 625.]

3. Jury (§ 7*)—Summoning Jury from Other County—Motion—Time to Make.—A motion under Code 1904, § 4024, for a jury from another county must precede a motion for a change of venue.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 12; Dec. Dig. § 7.* 9 Va.-W. Va. Enc. Dig. 8; 14 Va.-W. Va. Enc. Dig. 625.]

4. Criminal Law (§ 1144*)—Summoning Jury from Another County or Corporation—Grounds.—Where a motion for a jury from another county was based on the ground that an impartial jury could not be obtained from the county, the conclusive presumption arising from the fact that an impartial jury was subsequently secured in the county is that the motion was unfounded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. § 1144.* 9 Va.-W. Va. Enc. Dig. 8; 14 Va.-W. Va. Enc. Dig. 625.]

5. Criminal Law (§ 122*)—Jury (§ 7*)—Questions Reviewable—Motions Depending on Conditions at Time of Trial.—A motion for a change of venue on the ground of prejudice against accused, and a motion for a jury from another county or corporation, depend on conditions existing at the time of trial and are renewable on new trial when the exigencies of the situation require it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 254; Dec. Dig. § 1221; Jury, Cent. Dig. § 12; Dec. Dig. § 7.* 2 Va.-W. Va. Enc. Dig. 785.]

6. Jury (§ 70*)—Summoning Jury—Statutory Provisions.—Code 1904, § 4018, providing that the writ of venire facias in case of felony shall command the officer to summon 16 persons taken from the list furnished by the clerk, and providing that the list shall contain the names of 20 persons drawn by the clerk in the presence of the presiding judge or, in his absence, of one of the commissioners in chancery, and a reputable citizen not connected with accused or prosecutor, and declaring that for good cause shown the presiding judge may direct more than 20 names to be drawn and shall specify the number of names to be drawn and summoned, the number drawn not being more than 4 in excess of the number to be summoned, is mandatory, and there must be a substantial compliance therewith, and, in the ab-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

sence of any cause, it is improper to prepare a list containing the names of 60 persons, and to order the officer to summon 30 from that list; and where the persons summoned on a second venire were practically the same as those summoned on the first venire, which was quashed, on the ground that it was drawn in the presence of the commissioner in chancery, who was the active head of the prosecution, the statute was disregarded, though when the second venire was ordered the judge and the clerk in form drew the names from the jury box.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 310-330, 340, 250; Dec. Dig. § 70.* 9 Va.-W. Va. Enc. Dig. 22; 14 Va.-W. Va. Enc. Dig. 623; 15 Va.-W. Va. Enc. Dig. 588.]

7. Criminal Law (§ 363*)—Evidence—Res Gestæ.—Where there was no connection between a difficulty between accused and a third person, and the subsequent killing by accused of decedent, and the killing occurred at a different time and place, and decedent was not concerned in or present at the prior difficulty, the details and merits of the prior difficulty could not be shown, for they were no part of the *res gestæ*.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 804; Dec. Dig. 363.* 11 Va.-W. Va. Enc. Dig. 910; 14 Va.-W. Va. Enc. Dig. 902; 15 Va.-W. Va. Enc. Dig. 876.]

8. Municipal Corporations (§ 122*)—Ordinances—Admissibility.—The mere fact that the records of the council of a town were kept in a crude manner in an account book or ledger which had been used for other purposes, and which contained other matter than the by-laws and ordinances of the town, and also contained a sheet of type-written matter concerning the business of the town, injected between the by-laws and ordinances and the certification and signatures of the clerk and mayor, did not render the records inadmissible to prove an ordinance, where as a whole they contained a sufficient authentication of the ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 281-289; Dec. Dig. § 122.* 11 Va.-W. Va. Enc. Dig. 694; 15 Va.-W. Va. Enc. Dig. 857.]

9. Criminal Law (§ 834*)—Requested Instructions—Modification.—A requested instruction that, though decedent at the time he was shot was attempting to arrest accused, yet if in making such attempt he shot at deceased, and thereupon, because of the shooting, accused, believing himself in "imminent danger of being killed or sustaining great bodily injury," killed decedent, the killing was not murder, though accused had previously threatened to kill any one who might attempt to arrest him, was properly modified by inserting after the quoted phrase the words "and being without fault in provoking the difficulty."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2013,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

2014; Dec. Dig. § 834.* 7 Va.-W. Va. Enc. Dig. 158; 14 Va.-W. Va. Enc. Dig. 512; 15 Va.-W. Va. Enc. Dig. 463.]

10. Homicide (§ 151*)—Resisting Unlawful Arrest—Burden of Proof.—Where an officer having a lawful warrant attempted to arrest accused, the presumption, in absence of evidence to the contrary, is that the officer discharged his duty in a lawful manner, and accused, resisting the arrest and killing the officer, has the burden of showing that the officer's conduct justified resistance.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 276-278; Dec. Dig. § 151.* 7 Va.-W. Va. Enc. Dig. 137; 14 Va.-W. Va. Enc. Dig. 510; 15 Va.-W. Va. Enc. Dig. 462.]

Error to Circuit Court, Craig County.

Harvey D. Looney was convicted of murder in the first degree, and he brings error. Reversed.

O. B. Harvey, of Clifton Forge, and *Wm. E. Allen*, of Covington, for plaintiff in error.

Samuel Williams, Atty. Gen., and *J. P. Jones*, of New Castle, for the Commonwealth.

PATRICK *v.* COMMONWEALTH.

June 16, 1913.

[78 S. E. 628.]

1. Jury (§ 66*)—Impaneling—Presence of Commonwealth's Attorney.—Code 1904, § 4018, providing that the drawing of the names from the jury box to be placed on the jury list shall be in the presence of the presiding judge or, in his absence of one of the commissioners in chancery and a reputable citizen not connected with accused or prosecutor or, in case of homicide, with decedent, when read in connection with section 3146, authorizing the drawing of juries in civil cases in the presence of the attorney for the commonwealth, does not change the common-law rule that no one shall take part in the selection of jurors who does not stand indifferent to the parties, and it is improper for the commonwealth's attorney to be present during the drawing in felony cases.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 283-290; Dec. Dig. § 66.* 9 Va.-W. Va. Enc. Dig. 32; 14 Va.-W. Va. Enc. Dig. 624; 15 Va.-W. Va. Enc. Dig. 588.]

2. Jury (§ 66*)—Impaneling—Statutory Provisions.—Under Code 1904, § 4018, providing that names drawn from the jury box shall be placed on the list, and that, when 20 names have been drawn and placed on the list, the drawing shall cease, unless, for good cause shown in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.